

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

Jessica Miller, et al.,

Plaintiffs,

v.

**Case No. 1:05-cv-764
Judge Thomas M. Rose**

The University of Cincinnati,

Defendant.

**DECISION AND ENTRY ADOPTING REPORT AND
RECOMMENDATIONS OF CHIEF UNITED STATES MAGISTRATE
JUDGE MERZ (DOC. 77), OVERRULING PETITIONER'S OBJECTIONS
TO THE MAGISTRATE'S PROPOSED FINDINGS AND
RECOMMENDATIONS, (DOC. 78), AND GRANTING JOINT MOTION TO
REVISE PRELIMINARY PRETRIAL CONFERENCE ORDER. (DOC. 81).**

Pending before the Court are Plaintiff's Objections to the Chief Magistrate Judge's Proposed Report and Recommendations. (Doc. 78). The Report and Recommendations of United States Chief Magistrate Judge Michael R. Merz, (Doc. 77), recommends that Plaintiffs' Motion for Preliminary Injunction, (Doc. 28), be denied because Plaintiffs have not established irreparable harm or the substantial likelihood of prevailing on the merits of any of their three theories of recovery.

As required by 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b), the Court has made a *de novo* review of the record in this case. Upon said review, the Court's only concern is that the Report and Recommendation does not address Plaintiffs concern that Defendant's calculation of female student athletes double counts women who compete in both indoor and outdoor track.

Plaintiff's objection limits itself to pointing out that other sports that have a fall and spring season are not considered two sports, namely, golf tennis, across, field hockey, rowing and volleyball. This does not, however, constitute sufficient evidence to establish a substantial likelihood of prevailing on the merits of his claim due to this approach being incorrect. Nevertheless, the Court is concerned to note from its own research, that one school, when faced with a Title IX action brought by male athletes, appears to have considered “[i]ndoor, outdoor and cross country track [as] one sport for these purposes because the same athletes participate in all three sports.” *Gonyo v. Drake University*, 837 F. Supp. 989, 997 (S.D. Iowa 1993) (appendix A). Even more disturbingly, it appears that the Big Eight conference may have at one time treated indoor and outdoor track as separate sports for female athletes, but as a single sport for male athletes. *Fluitt v. University of Nebraska*, 489 F. Supp. 1194, 1205 (D. Neb. 1980) (deferring decision to allow plaintiff to amend his complaint to include this claim). Needless to say, the Court would appreciate evidence and briefing from both parties should this case be subject to future motions. Plaintiff's objections, (Doc. 78), to the Magistrate Judge's Report and Recommendations, (Doc. 77), are not well taken and they are hereby **OVERRULED**. Wherefore, the Court **DENIES** the Plaintiffs' Motion for Preliminary Injunction, (Doc. 28).

The parties' joint motion to revise the Preliminary Pretrial Conference Order, doc. 81, is hereby **GRANTED**. Motions not directed to the pleadings will now be due October 19, 2007.

DONE and **ORDERED** this Friday, September 21, 2007.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE